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7 UNITED STATES DISTRICT COURT
8 DISTRICT OF NEVADA
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10 JOHNNY LEE JONES, III,)

11 Petitioner,)

12 vs.)

13 DWIGHT NEVIN, *et al.*,)

14 Respondents.)
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2:11-cv-00584-PMP-GWF

ORDER

16 This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254,
17 by a Nevada state prisoner.

18 **I. *In Forma Pauperis* Application (ECF No. 1)**

19 Petitioner has filed a motion to proceed *in forma pauperis*. (ECF No. 1). Based on the
20 information regarding petitioner's financial status, the Court finds that the motion to proceed *in*
21 *forma pauperis* should be granted.

22 **II. Non-Exhaustion of State Court Remedies**

23 In the petition, petitioner admits that the grounds of the petition have not been presented to
24 the state supreme court. (ECF No. 1-1, at p. 1). Petitioner alleges that the Nevada Supreme Court
25 ruled that he is entitled to a *Lozada* remedy, but those proceedings have not concluded. Petitioner
26 asserts that he has been denied the right to appeal his conviction, claiming that the *Lozada* remedy is

1 somehow inadequate. Petitioner reiterates throughout the petition that his state court remedies have
2 not been exhausted.

3 A petitioner must first present his grounds for relief to a state court before a federal court
4 may review the merits of the issues he raises. A federal court will not grant a state prisoner's
5 petition for habeas relief until the prisoner has exhausted his available state remedies for all claims
6 raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state
7 courts a fair opportunity to act on each of his claims before he presents those claims in a federal
8 habeas petition. *See Picard v. Conner*, 404 U.S. 270, 275-76 (1971); *O'Sullivan v. Boerckel*, 526
9 U.S. 838, 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains
10 unexhausted until the petitioner has given the highest available state court the opportunity to
11 consider the claim through direct appeal or state collateral review proceedings. *See Casey v. Moore*,
12 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir. 1981). In the
13 instant case, post-conviction proceedings, pursuant to the *Lozada* remedy, are currently proceeding
14 in state district court. Because petitioner has not exhausted his grounds for relief in state court, this
15 action shall be dismissed.

16 **III. Certificate of Appealability**

17 In order to proceed with an appeal, petitioner must receive a certificate of appealability. 28
18 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951
19 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a
20 petitioner must make “a substantial showing of the denial of a constitutional right” to warrant a
21 certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84
22 (2000). “The petitioner must demonstrate that reasonable jurists would find the district court's
23 assessment of the constitutional claims debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484).
24 In order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues
25 are debatable among jurists of reason; that a court could resolve the issues differently; or that the
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1 questions are adequate to deserve encouragement to proceed further. *Id.* This Court has considered
2 the issues raised by petitioner, with respect to whether they satisfy the standard for issuance of a
3 certificate of appealability, and determines that none meet that standard. The Court will therefore
4 deny petitioner a certificate of appealability.

5 **IV. Conclusion**

6 **IT IS THEREFORE ORDERED** that the application to proceed *in forma pauperis* (ECF
7 No. 1) is **GRANTED**. The Clerk **SHALL FILE** the petition for a writ of habeas corpus.

8 **IT IS FURTHER ORDERED** that the petition is **DISMISSED WITHOUT PREJUDICE**
9 **AS UNEXHAUSTED**.

10 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
11 **APPEALABILITY**.

12 **IT IS FURTHER ORDERED** that the Clerk **SHALL ENTER JUDGMENT**
13 **ACCORDINGLY**.

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15 DATED: May 18, 2011.

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PHILIP M. PRO
United States District Judge